Zainur bin Zakaria v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–05–83 OF 1998
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
5 SEPTEMBER 2000

Criminal Procedure *— Contempt of court — Contempt in the face of the court — Advocate and solicitor filing contemptuous motion on behalf of client — Allegations of fabrication of evidence made against deputy public prosecutors — Whether advocate and solicitor's act an act of bad faith — Whether advocate and solicitor's act an attempt to undermine integrity of ongoing trial — Whether advocate and solicitor's act and conduct likely to interfere with administration of justice*

Criminal Procedure *— Contempt of court — Contempt in the face of the court — Particulars of charge — Whether charge contained in clear terms gist of accusation against contemnor — Whether charge distinctly stated specific offence against contemnor*

Criminal Procedure *— Contempt of court — Contempt in the face of the court — Sentencing for contempt — Contemnor adamantly refusing to apologize despite calls and opportunities extended by court — Whether custodial sentence appropriate — Whether sentencer had considered irrelevant matters when imposing sentence*

The appellant, an advocate and solicitor practising in the law firm of Zainur Zakaria & Co, had been convicted for contempt and sentenced to three months' imprisonment by Augustine Paul J in the High Court at Kuala Lumpur (see [1999] 2 MLJ 577). The appellant appealed against conviction and sentence. The circumstances leading to the conviction of the appellant arose in the course of a criminal case in which the appellant was one of the defence counsel. The accused in that case, Dato' Seri Anwar bin Ibrahim ('DSAI'), had on 28 November 1998 filed a notice of motion ('the motion') through the appellant's law firm, seeking inter alia to disqualify two deputy prosecutors — Dato' Abdul Gani Patail ('AGP') and En Azahar bin Mohamed ('Azahar') from continuing as prosecutors in his trial. The motion was supported by an affidavit affirmed by DSAI, which in turn was based on a statutory declaration ('the SD') affirmed by one Manjit Singh Dhillon ('MSD'), an advocate and solicitor, and a letter ('MSD-1') MSD had written to the Attorney General inter alia alleging improper prosecution in the case of *PP v Nallakaruppan a/l Solaimalai* Kuala Lumpur High Court Criminal Trial No 45–40–1998 ('the Nallakaruppan trial'). DSAI's affidavit referred to the SD and MSD-1 and alleged, inter alia, that both AGP and Azahar had requested Nallakaruppan to falsely implicate him (DSAI) in the commission of sexual offences with various married and unmarried women. The affidavit further alleged that both AGP and Azahar had abused their position and gone out of their way to fabricate evidence against DSAI, in order that more charges could be preferred against him. It was further averred that the involvement of both the prosecutors raised grave doubts as to the evidence already adduced by the prosecution in the accused's trial.

When DSAI's application came up for hearing on 30 November 1998, the High Court judge was of the view that the application was baseless and totally unsupported by the documents exhibited. The learned judge then proceeded to cite the appellant for contempt for having attempted to undermine the integrity of the trial. Before he was cited, the appellant was given an opportunity to tender an unconditional apology but refused to do so. The contemnor was then asked to show cause and in doing so said that he had filed the application upon the instructions of his client — DSAI. The High Court found the appellant guilty of contempt but before proceeding to convict and sentence him, gave him yet another opportunity to apologize. However, the appellant once again refused to do so. On appeal, counsel for the appellant submitted, inter alia, that: (i) the SD and MSD-1 if read together showed a strong suggestion of fabrication of evidence; (ii) the charge against the appellant lacked particulars; (iii) mens rea is a necessary element in contempt cases; and (iv) the High Court judge was wrong in adopting the summary procedure when dealing with the appellant's alleged contempt.

Held, dismissing the appeal against both conviction and sentence:

(1) The learned High Court judge had not erred in his perception of the meaning of contempt of court. The appellant's allegation of fabrication of evidence by the two deputy public prosecutors as contained in the affidavit in support of the application, was not supported by the SD and MSD-1. Consequently, the act of the appellant was obviously an act of bad faith. Under such circumstances, the appellant's application was an attempt to undermine the integrity of the trial of DSAI and an abuse of the process of court. The appellant's act and conduct were inherently likely to interfere with the administration of justice as a continuing process in the lower court (see pp 144D, 145H–146A).

(2) The charge contained in clear terms the 'gist of the accusation' against the appellant. The charge, in the circumstances of the whole proceedings as pictured in the learned judge's notes of evidence had 'distinctly stated the specific offence' against the appellant (see p 148C–D).

(3) Mens rea is immaterial in a contempt of court offence. On the facts, the appellant should have advised DSAI against the filing of the application. The appellant had known of ID14B at the relevant time and was also aware of what were facts and what were conclusions in the MSD-1. The learned High Court judge was right in holding that the filing of the application by the appellant 'was scandalous, frivolous, vexatious and an abuse of the process of the court ...' and a contempt of court. The appellant's intention was immaterial and the appellant had consequently committed contempt of court (see pp 150D, H–151A).

(4) The learned High Court judge had not taken into consideration any irrelevant matters with regard to sentence. Although apology might have changed the nature of the punishment, on the facts the appellant had adamantly and arrogantly refused to apologize (see p 152B–C).

Obiter:

Lately there has been an increase in contempt offences being committed by advocates and solicitors. As such, the time is now ripe for the imposition of custodial sentences in contempt offences (see p 152E).

[Bahasa Malaysia summary

Perayu, seorang peguambela dan peguamcara yang beramal di firma guaman Zainur Zakaria & Co, telah disabitkan atas kesalahan menghina mahkamah dan dijatuhkan hukuamn tiga bulan penjara oleh Augustine Paul H di Mahkamah Tinggi di Kuala Lumpur (lihat [1999] 2 MLJ 577). Perayu telah merayu terhadap sabitan dan hukuman tersebut. Keadaan-keadaan yang membawa kepada sabitan perayu timbul semasa satu kes jenayah sedang dijalankan di mana perayu merupakan salah seorang daripada peguambela. Tertuduh di dalam kes tersebut, Dato' Seri Anwar bin Ibrahim ('DSAI'), telah pada 28 November 1998 memfailkan satu notis usul ('usul tersebut') melalui firma guaman perayu, memohon antara lain agar dua orang timbalan pendakwa raya digugurkan — Dato' Abdul Gani Patail ('AGP') dan En Azahar bin Mohamed ('Azahar') daripada meneruskan perbicaraan mereka sebagai pendakwa raya. Usul tersebut telah disokong oleh satu afidavit yang disahkan oleh DSAI, yang berdasarkan satu deklarasi statutori ('DS tersebut') yang disahkan oleh seorang Manjit Singh Dhillon ('MSD'), seorang peguambela dan peguamcara, dan sepucuk surat ('MSD-1') yang ditulis oleh MSD kepada Peguam Negara antara lain mendakwa pendakwaan yang tidak betul di dalam kes *PP v Nallakaruppan a/l Solaimalai* Mahkamah Tinggi Kuala Lumpur Perbicaraan Jenayah No 45–40–1998 ('perbicaraan Nallakaruppan'). Afidavit DSAI merujuk kepada DS tersebut dan MSD-1 dan mendakwa, antara lain, bahawa kedua-dua AGP dan Azahar telah meminta Nallakaruppan untuk secara menipu membabitkan beliau (DSAI) di dalam perbuatan kesalahan seksual dengan beberapa wanita yang belum dan telah berkahwin. Afidavit tesebut seterusnya mendakwa kedua-dua AGP dan Azahar telah menyalahgunakan kedudukan mereka dan melebihi batasan mereka untuk memalsukan keterangan terhadap DSAI, agar terdapat lebih banyak tuduhan yang dibuat terhadap beliau. Adalah seterusnya ditegaskan bahawa penglibatan kedua-dua timbalan pendakwa raya tersebut menimbulkan keraguan yang serius berhubung dengan keterangan yang telahpun dikemukakan oleh pihak pendakwa di dalam perbicaraan tertuduh.

A Apabila permohonan DSAI dihadapkan untuk perbicaraan pada 30 November 1998, hakim Mahkamah Tinggi berpandangan bahawa permohonan tersebut tiada asas dan tidak langsung menyokong dokumen-dokumen yang diekshibitkan. Hakim yang arif kemudiannya telah seterusnya mensabitkan perayu telah melakukan satu penghinaan kerana telah cuba untuk menjejaskan integriti B perbicaraan tersebut. Sebelum beliau disabitkan, perayu telah diberi peluang untuk meminta maaf tanpa syarat tetapi beliau telah enggan berbuat demikian. Perayu yang dikatakan menghina kemudiannya telah diminta untuk tunjuk sebab dan di dalam berbuat demikian menyatakan bahawa beliau telah memfailkan permohonan tersebut C atas arahan anak guam beliau — DSAI. Mahkamah Tinggi mendapati perayu bersalah kerana menghina tetapi sebelum prosiding untuk mensabit dan menghukum beliau, satu lagi peluang untuk memohon maaf telah diberikan kepada beliau. Walau bagaimanapun, perayu sekali lagi telah enggan berbuat demikian. Ketika rayuan, peguam perayu menghujahkan, antara lain, bahawa: (i) SD dan MSD-1 jika D dibaca bersama menunjukkan terdapat cadangan yang kukuh untuk memalsukan keterangan; (ii) pertuduhan terhadap perayu tidak mempunyai butir-butir yang mencukupi; (ii) mens rea adalah elemen yang perlu wujud di dalam kes-kes menghina mahakmah; dan (iv) hakim Mahkamah Tinggi telah khilaf apabila menggunakan prosedur terus dalam mengendalikan dakwaan penghinaan perayu.

E

Diputuskan, menolak rayuan terhadap kedua-dua sabitan dan hukuman:

(1) Hakim Mahkamah Tinggi yang arif tidak khilaf di dalam persepsi beliau tentang maksud menghina mahkamah. Dakwaan perayu F berhubung pemalsuan keterangan oleh dua orang pendakwa raya sebagai mana yang terkandung di dalam afidavit sokongan permohonan tersebut tidak disokong oleh SD dan MSD-1. Seterusnya, tindakan perayu jelas menunjukkan ia satu tindakan berniat jahat. Di dalam keadaan sedemikian, permohonan perayu G merupakan percubaan untuk menjejaskan integriti perbicaraan DSAI dan satu penyalahgunaan proses mahkamah. Tindakan dan perbuatan perayu memang berkemungkinan mengganggu pentadbiran keadilan sebagai satu proses berterusan di mahkamah rendah (lihat ms 144D, 145H–146A).

(2) Pertuduhan mengandungi dalam terma yang jelas 'inti pati H pertuduhan' terhadap perayu. Pertuduhan tersebut, di dalam keadaan keseluruhan prosiding sebagai mana yang digambarkan di dalam nota-nota keterangan hakim yang arif telah 'secara nyata menyatakan kesalahan yang spesifik tersebut' terhadap perayu (lihat ms 148C–D).

I (3) Mens rea adalah tidak material di dalam kesalahan menghina mahkamah. Berdasarkan fakta-fakta, perayu sepatutnya menasihati DSAI daripada memfailkan permohonan tersebut.

Perayu telahpun mengetahui tentang ID14B pada masa itu dan juga mengetahui apakah fakta-fakta dan apakah kesimpulan-kesimpulan di dalam MSD-1. Hakim Mahkamah Tinggi yang arif adalah betul apabila memutuskan bahawa pemfailan permohonan oleh perayu adalah 'melampau, remeh, menyusahkan dan satu penyalahgunaan proses mahkamah ...' dan satu penghinaan mahkamah. Niat perayu adalah tidak material dan perayu telahpun dengan itu melakukan penghinaan mahkamah (lihat ms 150D, H–151A).

(4) Hakim Mahkamah Tinggi yang arif tidak mempertimbangkan apa-apa perkara yang tidak material behubung dengan hukuman. Walaupun permohonan maaf mungkin dapat mengubah sifat hukuman, berdasarkan fakta-fakta perayu telah dengan keras dan angkuh enggan memohon maaf (lihat ms 152B–C).

Obiter:

Kebelakangan ini terdapat peningkatan kesalahan menghina yang dilakukan oleh peguambela dan peguamcara. Justeru itu, telah sampai masanya untuk dikenakan hukuman tahanan dalam kesalahan-kesalahan penghinaan (lihat ms 152E).]

Notes

For cases on contempt of court, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1120–1144.

Cases referred to

Attorney General v Butterworth [1963] 1 QB 696 (refd)
Attorney General v Times Newspapers Ltd [1974] AC 273; [1973] 3 All ER 54 (refd)
Attorney General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167 (refd)
Balogh v Crown Court [1974] 3 All ER 283 (refd)
Bell v Stewart (1920) 28 CLR 419 (refd)
Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240 (refd)
Cheah Cheng Hoc v PP [1986] 1 MLJ 299 (refd)
Coward v Stapleton (1953) 90 CLR 573 (refd)
Gamalath Ralalage Daniel Appuhamy v The Queen [1963] AC 474 (refd)
Jaginder Singh & Ors v Attorney General [1983] 1 MLJ 71 (refd)
Karam Singh v PP [1975] 1 MLJ 229 (refd)
MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court AIR 1955 SC 19 (refd)
R v Gray [1900] 2 QB 36 (refd)
R v Griffin (1988) 88 Cr App R 63 (refd)
Skipworth's Case (1873) LR 9 QB 230 (refd)
St James' Evening Post Case, The (1742) 2 Atk 469 (refd)

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application [1990] 1 MLJ 273 (refd)
Yusof Ali Khan v State PLD 970 SC 350 (refd)
Zainur Zakaria, Re [1999] 2 MLJ 577 (refd)

Appeal from: Criminal Trials No 45–48 of 1998 and No 45–49 of 1998 (High Court, Kuala Lumpur)

Raja Aziz Addruse (*Sulaiman Abdullah, Aris Rizal Christopher Fernando, Ambiga Sreenevasan, Md Ariff Md Yusof, Zulkifli Nordin, Christopher Leong, Sankara M Nair* and *Charmaine Chow* with him) (*Sivanathan & Associates*) for the appellant

Mohd Yusof Zainal Abidin (*K Muniandy, Zauyah Bee Loth Khan* and *Shamsul Sulaiman* with him) (Attorney General's Chambers) for the respondent

Cur Adv Vult

Ahmad Fairuz JCA (delivering judgment of the court): The appellant, an advocate and solicitor, practising in the law firm of Zainur Zakaria & Co, was convicted for contempt and sentenced to three months' imprisonment by the learned judge of the High Court of Malaya at Kuala Lumpur (see [1999] 2 MLJ 577). The appellant appealed to this court. We heard oral arguments of the appeal on 21 and 22 March 2000. We then reserved judgment. We now hand down the following judgment.

The circumstances leading to the conviction of the appellant arose in the course of a criminal case in which the appellant was one of the defence counsel. The accused in the case was Dato' Seri Anwar Ibrahim ('DSAI'). The trial began on 2 November 1998. On 28 November 1998, DSAI applied inter alia to disqualify two deputy public prosecutors from continuing as prosecutors in his trial. The application and the affidavit of DSAI were filed by the appellant's firm on Saturday, 28 November 1998.

The affidavit of DSAI exhibited a statutory declaration ('SD') of one Mr Manjeet Singh Dhillon ('MSD') as 'DSAI-2'. MSD is an advocate and solicitor of the High Court of Malaya and was counsel for Dato' Nallakaruppan a/l Solaimalai in Kuala Lumpur High Court Criminal Trial No 45–40–1998. In the SD, MSD referred to a letter written by him to the Honourable Attorney General ('A-G'). The letter was dated 12 October 1998 and was marked as 'MSD-1'. According to 'MSD-1', MSD met Dato' Abdul Gani Patail ('AGP') at his office on 2 October 1998. At that meeting, AGP expressed that he wanted Dato' Nallakaruppan, in exchange for a reduction of the charge against him (which charge carried a death sentence), in the words used in 'MSD-1', 'to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women'.

The SD also disclosed that 'MSD-1' was sent to the A-G on 12 October 1998. On 13 October 1998, MSD met the A-G. Nothing transpired at that meeting about the allegations in 'MSD-1'. The A-G, however, mentioned

that 'MSD-1' was not clear as to how Dato' Nallakaruppan would plead to an amended charge under the Arms Act. MSD responded that Dato' Nallakaruppan would plead guilty. The A-G asked for a letter to confirm that and either he or Azahar would revert to MSD after that. On 14 October 1998, MSD sent out the letter confirming that Dato' Nallakaruppan would plead guilty on an amended charge. On 16 October 1998, MSD telephoned Azahar who confirmed having received the letter. In that telephone conversation, Azahar was alleged to have said, in the words used in the SD, 'there would have to "be something else" [ie more than just a plea of guilt to an amended charge]'. This is contained in para 7 of the SD which further stated:

> This 'something else' asked for by En Azahar was obviously what Dato' Gani had asked for on 2 October 1998 and confirmed to me a common approach to extracting evidence from Nallakaruppan a/l Solaimalai by using the ISA 'death threat' as their bargaining chip.

Having referred to the SD and 'MSD-1', DSAI's affidavit, in its para 13, inter alia, stated:

> Dato' Abdul Gani Patail yang tersebut dahulu telah membayangkan [indicated] bahawa dia akan mempertimbangkan permintaan tersebut jika Datuk Nallakaruppan bersedia untuk bekerjasama dengan Kamar Peguam Negara dengan secara palsu membabitkan saya di dalam perlakuan kesalahan-kesalahan seksual dengan beberapa orang wanita yang telah atau belum berkahwin; ... .

(The learned High Court judge had quoted the English version of this para 13 in his learned judgment in *Re Zainur Zakaria* [1999] 2 MLJ 577 at p 584 and it reads:

> ... Dato' Abdul Gani Patail had indicated that he would consider the request if Datuk Nallakaruppan was prepared to cooperate with the Attorney General's Chambers by falsely implicating me in the commission of sexual offences with various married and unmarried women; ... .)

In para 16 of his affidavit, DSAI said:

> Tindak-tanduk mereka yang dirujuk di atas menunjukkan kedua-dua Dato' Abdul Gani Patail dan En Azahar bin Mohamed telah menyalahgunakan kedudukan mereka sebagai pegawai-pegawai Kamar Peguam Negara dan sebagai pendakwa-pendakwa di dalam perbicaraan saya di sini, dengan mencuba sedaya upaya untuk membuatkan Datuk Nallakaruppan mereka-palsu keterangan bagi membolehkan lebih banyak pertuduhan-pertuduhan dibuat terhadap saya berkenaan lain-lain kesalahan seksual yang dikatakan.

(The learned High Court judge, in his judgment at p 585 quoted the English version of the paragraph thus:

> Their conduct referred to above shows both Dato' Abdul Gani Patail and En Azahar bin Mohamed to have abused their position as officers of the Attorney General's Chambers and as prosecutors in my trial herein, by going out of their way to get Datuk Nallakaruppan to fabricate evidence in order to prefer more charges against me for other alleged sexual offences.)

In para 18 of the affidavit, DSAI said:

> Setelah menampakkan diri mereka sebagai amat tidak profesional di dalam perlaksanaan tanggungjawab mereka dan sebagai mempunyai kepentingan peribadi dalam mempastikan kesabitan kesalahan saya melalui cara yang boleh dipersoalkan, penglibatan mereka di dalam perbicaraan saya di sini telahpun membangkitkan keraguan yang mendalam terhadap keutuhan keterangan yang telah setakat ini dikemukakan oleh pihak pendakwaan.

(The English version as spelt out in the learned judge's judgment at p 585 reads:

> Having shown themselves to be highly unprofessional in the performance of their duties and to be personally interested to secure my conviction by questionable means, their involvement in my trial herein has already raised grave doubts as to the integrity of the evidence which has so far been adduced by the prosecution.)

The above quoted paragraphs in particular led DSAI not to believe that it would be in the interests of justice for AGP and Dato' Azahar to proceed to conduct the prosecution against him.

The application was heard on 30 November 1998. According to the notes of evidence of the learned judge, the appellant, at the request of the learned judge, read the SD and 'MSD-1'. In answer to the learned judge's question, the appellant agreed that the SD and 'MSD-1' formed the basis of DSAI's application. The learned judge then read out from various textbooks the law relating to accomplice evidence and the right of the Public Prosecutor to reduce a charge or not to charge a person if he cooperates and provides information to the police. To further questions by the learned judge, the appellant stated that the allegations in paras 13, 16 and 18 of DSAI's affidavit are supported by the aforementioned documents — in particular paras 2–4 of 'MSD-1'. The appellant also agreed with the learned judge that para 4 of 'MSD-1' is MSD's own conclusion. When referring to para 3, the learned judge asked:

> ... Which part of para 3 suggests that there was a request to fabricate evidence ?

The appellant replied:

> Para 3 must be read with para 4 ... .

The learned judge asked further:

> Does item 3 in para 3 suggest that there was a request to fabricate evidence ?

The appellant answered:

> It must be read with para 4.

The learned judge then asked again where in para 3 is the suggestion that a request was made to fabricate evidence. In answer to that the appellant, inter alia, said:

> The use of the words 'creation and collection of evidence which is otherwise not there' suggests that Nalla was requested to give evidence against Dato' Seri Anwar.

To this the learned judge said:

> You say 'to give evidence' — nothing wrong with that. Where is the evidence to show that there was a request to fabricate evidence ?

To this the appellant responded:

> In para 4, the use of words 'to create evidence' means Nalla is asked to create evidence.

The learned judge then asked:

> Are you satisfied that the two documents in question suggest that there was a request to fabricate evidence?

The appellant replied:

> Yes.

The notes of evidence then revealed the learned judge's remarks which, amongst others, stated:

> In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you, I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so, this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the A-G, to Dato' Gani Patail and to En Azahar for filing an application which is absolutely baseless and which is an abuse of the process of court. (Court to adjourn for half and hour to enable En Zainur to think about it.)
>
> 10.45 Court adjourns.

When the court resumes its proceedings, the appellant informed the court thus: 'I have come to a decision that I am unable to tender my apologies'. Then the court said:

> I shall now cite you for contempt of court.
>
> Encik Zainur Zakaria, I call upon you to show cause why you should not be punished for contempt of court for filing a notice of motion with a supporting affidavit which contains scandalous and contemptuous matters, in particular in paras 13, 16 and 18.

At this juncture, Raja Aziz, one of the counsel representing DSAI informed the court that he, together with Haji Sulaiman Abdullah, Christopher Fernando, Gurbachan Singh, Sankara N Nair, Pawan Cheek Merican, Kamar Ainiah and Zulkifli Nordin were representing the appellant. Refusing an application for adjournment by the appellant's counsel, the learned judge requested the appellant to show cause immediately. The appellant then gave evidence from the witness box. On this, the notes of evidence shows:

> Zainur Zakaria
>
> A/S English
>
> Advocate and Solicitor
>
> The application was filed upon instructions by my client, Dato' Seri Anwar Ibrahim. And I did so in the discharge of my professional duty. The

A obligations of an advocate and solicitor is not only found in common law but in our case is also, if I may say, enshrined in our Legal Profession Act, if I am not mistaken, s 42 requires an advocate and solicitor to uphold justice without fear or favour. That was my objective in filing this application.

Sgd: (Datuk Augustine Paul)

B No questions by court.

Sgd: (Datuk Augustine Paul)

The learned judge then found the appellant guilty of contempt. When asked to address on sentence, the appellant said:

C It was not the intention to commit contempt. When the defence team studied the application before filing, it was based on the documents exhibited. Our instructions were based on the documents. In the interest of justice, it was felt this matter must be brought to attention of court.

The learned judge then asked the appellant:

D You do not wish to tender an apology in the terms that I described earlier?

The appellant replied:

I regret I am unable to do that.

The court then proceeded to convict the appellant and sentence him to E three months' imprisonment.

Before us, the learned appellant's counsel submitted that the SD and 'MSD-1' if read together, would show a strong suggestion of fabrication of evidence. The learned counsel contended that the two deputy public prosecutors were trying to fabricate evidence. The learned counsel then invited us to pp 27–30 of the learned judge's grounds of judgment wherein F the learned judge, when referring to exh ID14B, said (at p 598E–F): 'At the time he filed the motion the prosecution had already tendered in evidence exh ID14B of which ZZ, being a senior member of the defence team, must be aware'. (ZZ, in the grounds of judgment, refers to the appellant). After quoting the material parts of ID14B, the learned judge then said (at G pp 599H–600A): 'The pertinent parts of exh ID14B that I have reproduced reveal the involvement of Dato Nallakaruppan in the alleged relationship between the accused and Shamsidar. As this exhibit was in the possession of the prosecution when MSD met AGP, AGP was clearly not asking for ".... evidence that is otherwise not there ...". As ZZ was aware or ought to have been aware of the contents of exh ID14B his acceptance of the H conclusion of MSD as appearing in para 4 of the letter is sheer recklessness and negligence at its height. ZZ has in fact expanded on the mildly worded conclusion of MSD to found an allegation which is completely baseless and unsupported by the evidence available to him. As a matter of fact, the contents of exh ID14B ought to have put ZZ on guard when he read the letter.' (The accused in the grounds of judgment refers to DSAI whilst I Shamsidar refers to the wife of one Mohamed Azmin). This, urged the learned counsel, showed that the learned judge had gone off tangent and was not dealing with the issues before him.

In response to this submission, the learned counsel for the respondent argued that the relevant parts of the SD and 'MSD-1' did not support the appellant's contention that the two DPPs were trying to fabricate evidence against DSAI. The respondent contended further that an offence under s 498 Penal Code (ie enticing of married women) was disclosed by ID14B. Under the circumstances, the respondent contended that the application of the appellant had the effect of trying to influence the learned judge to hold the view that the evidence so far tendered before him were fabricated. This, consequently, it was submitted had a tendency to obstruct the ordinary course of justice or to prejudice the trial before the learned judge. As such, the respondent argued that the learned judge had the power and duty to summarily deal with the appellant for contempt.

The learned judge in his grounds of judgment referred to *Attorney General v Times Newspapers Ltd* [1974] AC 273 at p 302; [1973] 3 All ER 54 at p 66 as an authority on the purpose of contempt proceedings. The learned judge then quoted from Lord Russell's judgment in *R v Gray* [1900] 2 QB 36 to show what acts constitute contempt of court. We are accordingly of the view that the learned judge has not erred in his perception of the meaning of contempt of court. In fact, Lord Cross of Chelsea in *Attorney General v Times Newspapers Ltd* said at p 322:

> ... 'Contempt of court' means an interference with the administration of justice ... .

In the notes of evidence, the learned judge stated that the application of DSAI was baseless because it was totally unsupported by the documents exhibited therein. Accordingly the learned judge held that the application was an attempt to undermine the integrity of the trial of DSAI and also an abuse of the process of court. Thus, according to the learned judge, the appellant had committed contempt of court.

In his grounds of judgment, the learned judge referred to para 4 of 'MSD-1' — in particular to the following (at p 597G–H):

> ... To use the death threat as a means to the extortion of evidence that is otherwise not there (why else make such a demand?) is unforgivable ... .

The learned judge then commented thus (at pp 597H–598C):

> ... MSD was in no position to come to such a conclusion in the absence of knowledge of the nature of evidence that is contained in the investigation papers in the hands of the prosecution. The use of the words by him '... (why else make such a demand?) ... ' clearly show that his views were based on the assumption that the prosecution did not have any evidence at all and, as a result, he was asked for evidence ... 'that is otherwise not there'. ... the conclusion of MSD as contained in para 4 of the letter may be justifiable only if it was arrived at after he had discussed the matter with his client in order to ascertain what the latter knew. The letter is dated 12 October 1998. However, para 8 of the SD states that MSD met his client on 13 October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he had discussed the matter with his client to find out what the latter knew. I find support for this in para 8 of the SD where MSD had said that there was nothing that his client could have done '... short of lying'. This

> clearly indicates that up to the 13th, MSD did not know what his client knew. It cannot be assumed that MSD was aware of what his client knew at that point of time as otherwise there would have been no need for him to refer the matter to his client which he did. For MSD, therefore, to refer to '... the extortion of evidence that is otherwise not there ...' is ill-advised.

The learned judge then concluded thus (at p 598D–E):

> ... In my opinion, there is no indication, explicit or subtle, direct or indirect, in the request for information against the accused by AGP for the giving of any false information. It was an exercise of lawful powers with no undertones of any impropriety. The conversation that transpired at the meeting as described in para 3 of the letter ought to have made this plain and patent even to the most uninitiated. It follows that the reading of anything else into para 3 of the letter is an act of bad faith calculated to undermine the administration of justice.

Having come to such an opinion, the learned judge then quoted the material parts of ID14B which in brief revealed the involvement of Dato' Nallakaruppan in the alleged relationship between DSAI and Shamsidar. According to the learned judge, ID14B had already been tendered in evidence when the appellant filed the application. Consequently, the learned judge was of the view that the appellant, being a senior member of the defence team was or ought to have been aware of the contents of the ID14B. As such, the learned judge found (at p 599J) that the appellant's acceptance of MSD's conclusion in para 4 of 'MSD-1' was 'sheer recklessness and negligence at its height'. We agree with the learned judge's conclusion and reasonings. We would however add by pointing out that 'MSD-1' reveals that, at the meeting between AGP and MSD, AGP expressed that he wanted Dato' Nallakaruppan in exchange for the reduction of the charge against him (which charge carried the death sentence), in the words used in 'MSD-1', '*to cooperate with them and to give information* against Anwar Ibrahim, specifically on matters concerning several married women'. (Emphasis added.) We however found that para 13 of DSAI's affidavit (quoted above, see p ?? of this judgment) significantly uses the words '.... *dengan secara palsu membabitkan saya ...* .' (Emphasis added.) (The English version as quoted by the learned judge is to the effect '... *by falsely implicating me ...*' [emphasis added]). 'MSD-1' uses the words 'to give information'. DSAI's affidavit uses the words 'by falsely implicating me'. Hence, we are of the view that the learned judge was correct when he opined that there was 'no indication, explicit or subtle, direct or indirect, in the request for information against' DSAI by AGP for the giving of any false information. To transform the words 'to give information' against DSAI to 'falsely implicate' DSAI can never be justified linguistically — even when the letter is read as a whole. The meanings of the two phrases are obviously poles apart. Clearly therefore, the appellant's allegation of fabrication of evidence by the two deputy public prosecutors as contained in the affidavit in support of the application, are not supported by the SD and 'MSD-1'. Consequently, this act of the appellant is obviously, as correctly put by the learned judge, an act of bad faith. Under such circumstances, we agree with the learned judge when he held that the appellant's application was an

attempt to undermine the integrity of the trial of DSAI and abuse of the process of court. We are, in fact, of the view that the appellant's act and conduct are inherently likely to interfere with the administration of justice as a continuing process in the lower court (*Attorney General v Butterworth* [1963] 1 QB 696). In this connection, we would like to refer to para 18 of DSAI's affidavit which alleges that the deputy public prosecutors' involvement in the trial of DSAI have already raised grave doubts as to the integrity of the evidence which had so far been adduced by the prosecution. This, in our view, is an act that tends to prejudice the prosecution in the trial of DSAI. This is because the allegation that the deputy public prosecutors fabricate evidence has not been supported by the SD and 'MSD-1'. At this jucture, we would like to quote what Lord Hardwicke LC in *The St James' Evening Post Case* (1742) 2 Atk 469 said at p 469 (which was quoted by Lord Reid in *Attorney General v Times Newspapers Ltd* [1974] AC 273 at p 295; [1973] 3 All ER 54 at p 60, ie:

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

This, in our view, is most relevant in the light of what the learned judge, in his grounds of judgment, said (at p 602C):

> This assumes monumental significance in this case in view of its extensive publicity both at national and international levels.

Thus, for the reasons stated above, we find that the learned judge was right in holding that the acts and conduct of the appellant sufficiently constituted contempt of court.

The next issue raised by the appellant was the fact that 'MSD-1' was not denied by the A-G when MSD met him at his office. The appellant also contended that the A-G never sought for an adjournment in order to put in an affidavit-in-reply. As such, the appellant submitted, the learned judge had to accept the contents of DSAI's affidavit, the SD and 'MSD-1' as correct. On this issue, the learned respondent's counsel drew our attention to p 33 of the learned judge's grounds of judgment wherein the learned judge said (at p 601F–G):

> In considering whether the motion filed by Messrs Zainur Zakaria & Co was contemptuous, I accepted the description as to what transpired between AGP and MSD at the meeting as stated in the documents annexed to the motion.

At p 43 of the grounds of judgment, the learned judge said (at p 606I):

> The whole basis of the contempt proceedings that I had instituted against ZZ is anchored on what had transpired at the meeting between AGP and MSD based on documents filed by ZZ which I had accepted and which were comprehensive.

Because of these findings, the learned respondent's counsel argued that the A-G's failure to file affidavit-in-reply was a non-issue. We agree with the respondent. Consequently, we also agree with the learned judge that the

A calling of witnesses by the appellant was unnecessary. The learned judge was therefore right in refusing an adjournment to enable the calling of witnesses.

The next attack of the learned appellant's counsel was on the charge which reads: 'I shall now cite you for contempt of court. Encik Zainur B Zakaria, I call upon you to show cause why you should not be punished for contempt of court for filing a notice of motion with a supporting affidavit which contains scandalous and contemptuous matters, in particular, in paras 13, 16 and 18.' The learned counsel contended that there are no adequate particulars in that charge. In reply, the learned respondent's counsel referred us to the case of *Balogh v Crown Court* [1974] 3 All ER 283 C wherein Stephenson LJ at p 290 said:

> The power of a superior court to commit (or attach) a contemnor to prison without charge or trial is very ancient, very necessary but very unusual, if not indeed unique. It is as old as the courts themselves and it is necessary for the performance of their functions of administering justice, whether they exercise criminal or civil jurisdiction.

D

We also were referred to a comment made by Mustill LJ, in the case of *R v Griffin* (1988) 88 Cr App R 63 which reads, at p 67:

> In proceedings for criminal contempt there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should E initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of complaint, F selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need.

G

The learned appellant's counsel referred us to the case of *Coward v Stapleton* (1953) 90 CLR 573 wherein the High Court of Australia, at pp 579–580, said:

> Even apart from any such express provision, however, it is a well-recognized H principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *Re Pollard* (1868) LR 2 PC 106; *R v Foster; Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v Piggott* [1909] AC 312. The charge having been made sufficiently explicit, the person accused must then be I allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he

> may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.

In *Gamalath Ralalage Daniel Appuhamy v The Queen* [1963] AC 474 (referred to us by the learned appellant's counsel) Lord Dilhorne LC, at p 483, said:

> It was clearly established in *Re Pollard*, on a reference to the Judicial Committee of the Privy Council, that no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him.

With these authorities in mind, we perused the notes of evidence of the learned judge and found that the notes abundantly show that the learned judge had complied with the principles laid down by those authorities. We are satisfied that the charge contains in clear terms 'the gist of the accusation' against the appellant (*Coward v Stapleton*). The charge, in the circumstances of the whole proceedings as pictured in the learned judge's notes of evidence, has 'distinctly stated the specific offence' against the appellant (*Gamalath Ralalage Daniel Appuhamy v The Queen*).

The learned appellant's counsel also urged us to hold that mens rea is a necessary element in contempt offences. However, the learned respondent's counsel referred us to several authorities which support his argument that mens rea is not an ingredient of the contempt offence. On this issue, both counsel and the learned judge made reference to the case of *Attorney General v Butterworth & Ors*. The learned appellant's counsel drew our attention to pp 722–723 of the report and in particular to p 722, wherein, Lord Dening MR, was reported to have said:

> I think the short answer to this contention is that contempt of court is a criminal offence, punishable summarily by the court itself, and, like all criminal offences, it requires in general a guilty mind.

On the other hand, the learned respondent's counsel referred us to the following part of Donovan LJ's judgment in the same case at p 725 of the report:

> I return to the finding in the present case that none of the respondents had any future proceedings in mind or any intention to interfere with the course of justice. I regard that state of affairs as immaterial. The question is whether the respondents' action was calculated so to interfere, and this involves a consideration not of their state of mind on this particular point but of the inherent nature of their act: see as to this the decision in *Reg v Odhams Press Ltd, ex p Attorney General* [1956] 3 All ER 494; [1957] 1 QB 73.

At p 726 Donovan LJ, said:

> I conceive the position, however, to be this. *Reg v Odhams Press Ltd, ex p Attorney General* makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere. A newspaper article accusing a man of crime after proceedings have been begun and before his trial plainly answers that description. But

> there may be other actions where the likely effect is not self-evident, and further inquiry will have to be made. The present case is an instance. The respondents were within their legal rights in seeking to relieve Greenlees from his honorary posts. But if the object of doing so was not merely to exercise that right for the good of the branch but to punish him for the evidence which he gave before the Restrictive Practices Court, and if the taking of such revenge was calculated to interfere with the administration of justice, then it will be no answer for the respondents to say that, while intending to punish Greenlees, still they had no intention of interfering with the administration of justice. Thus far the case is no different from *Reg v Odhams Press Ltd, ex p Attorney General.* But where it differs is that in order to determine the likely effect of what the respondents did, one has to inquire into their motives. The mere fact that the court has to do this cannot, in my view, involve the consequence that contempt of court has not been committed.

We note that Donovan LJ, had said in no uncertain terms that the existence of any future proceedings in the mind of an offender or the fact that the offender had any intention to interfere with the course of justice was immaterial in the consideration of whether the contempt offence had been committed. We also observe that the remaining judge in the case, ie Pearson LJ had, in his judgment, inter alia, said at p 728 of the report:

> In my judgment, however, such victimization, because it tends to deter persons from giving evidence as witnesses in future proceedings, and giving that evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt of court, and can be dealt with summarily under the inherent jurisdiction.

Pearson LJ used the term 'tends' and not 'intends'. In fact, both Donovan LJ and Pearson LJ, when making those statements addressed themselves to the specific facts before them, ie interference with witnesses whilst Denning MR, on the other hand, was making the above-quoted remark in a general context. We agree with the view expressed by both the learned Lord Justices. But before we leave this subject, we would like to refer to the case of *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167. The learned Attorney General in that case contended that the respondent's honest intention was no defence to a contempt of court charge.

He referred to the case of *Yusof Ali Khan v State* PLD 970 SC 350 wherein Hamoodur Rahman CJ, inter alia, said (at p 180H):

> No one can be allowed to defame, ridicule or abuse a judge in his public capacity even with the best of motives because if that sort of thing were once held to be permissible the whole judicial system would readily be brought into utter contempt.

After referring to this and several other authorities, Mohamed Yusoff SCJ, said at p 180: 'On this basis I would accept the Attorney General's contention as a proper statement of the law.' In the same case, Gunn Chit Tuan SCJ, referred to defence counsel's argument on mens rea. The counsel had referred the court to several cases from Canada. The Attorney General, however, referred the court to several cases from Pakistan and

India to support his submission that the intention of the respondent as a contemnor was immaterial if the court was satisfied that the criticism amounted to contempt. After considering both counsel's submissions, Gunn Chit Tuan SCJ, said at p 182:

> In this case, there can be no doubt that the respondent intended to affirm the affidavits in question and in paras 7, 9 and 11 of the said affidavit dated 25 April 1989, there are, as already pointed out, statements containing accusations and allegations which were an attack on Justice Tun Dato' Abdul Hamid causing unwarranted and defamatory aspersions on his character, which could be considered to be scurrilously abusive of the judge, thereby amounting to contempt by scandalizing the court. Even if the respondent was acting on instructions, he has read the statements in his affidavits and must accept responsibility for the contents (see the Privy Council case of *Vijaya Wickramatunga Vidyasagara v The Queen* [1963] AC 12).

In fact Gunn Chit Tuan SCJ, had earlier on said (at p 181):

> Having considered the circumstances in which the words were uttered or published in the said affidavit, I would prefer to follow the persuasive authority of the Pakistan Supreme Court case of *Yusof Ali Khan v State*, in which it was held, inter alia, that a legal practitioner can be guilty of contempt of court even for language professedly used in discharge of his functions as an advocate.

The passages quoted above, in our view, show that mens rea is immaterial in a contempt of court offence. We would however, at this point, like to refer to the evidence given by the appellant from the witness box to the effect that the application was filed by him on his client's instructions. On this, we would refer to the case of *MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court* AIR 1955 SC 19, wherein, at p 23, Mahajan CJ, said:

> It cannot be denied that a section of the Bar is under an erroneous impression that when a counsel is acting in the interests of his client, or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the court. They think that when there is conflict between their obligations to the court and their duty to the client, the latter prevails.
>
> This misconception has to be rooted out by a clear and emphatic pronouncement, and we think it should be widely made known that counsel who sign applications or pleadings containing matter scandalizing the court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefor, with a view to prevent or delay the course of justice, are themselves guilty of contempt of court, and that it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.

This statement of Mahajan CJ, clearly, in our view, applies to the appellant. He should have advised DSAI against the filing of the application. He had known of the ID14B at the relevant time. He was also aware of what were facts and what were conclusions in the MSD-1. Accordingly, we are of the view that the learned judge was right in holding that the filing of the application by the appellant 'was scandalous, frivolous, vexatious and an

A abuse of the process of the court ...' and a contempt of court. The learned judge in the court below therefore was right in holding, in the circumstances of the case before him, that the respondent's intention was immaterial and the respondent had consequently committed contempt of court.

It was also submitted by the appellant that the learned judge was wrong
B in adopting the summary procedure when dealing with the alleged contempt by the appellant. The learned respondent's counsel argued otherwise. On this issue, we find that the learned judge had reminded himself of the principles pertaining to the exercise of the summary procedure as laid down by the cases of *Jaginder Singh & Ors v Attorney General* [1983] 1 MLJ 71, *Cheah Cheng Hoc v PP* [1986] 1 MLJ 299 and
C *Karam Singh v PP* [1975] 1 MLJ 229. The Supreme Court had in *Cheah Cheng Hoc*'s case said (at p 301):

> This power must be used sparingly but fearlessly when necessary to prevent obstruction of justice. We feel that we must leave the exercise of this awesome power to the good sense of our judges. We will interfere when this power is misused.

D

The High Court of Australia in *Bell v Stewart* (1920) 28 CLR 419 had said (at p 428):

> The only justification for the summary process of a court punishing a person for contempt is to protect the public by guarding the administration of justice
E from any obstruction or interference which might affect its purity, its impartiality or its effectiveness.

Blackburn J in *Skipworth's Case* (1873) LR 9 QB 230 at p 233, said:

> When an action is pending in the court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial,
F there is a power given to the courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times that the law has existed.

At p 30 of the grounds of judgment, the learned judge said (at p 600B–D):

G > ... To further state in para 18 of the affidavit that the involvement of the senior deputy public prosecutors ' ... has already raised grave doubts as to the integrity of the evidence ... ' adduced by the prosecution in this case is an attempt to undermine the integrity of this trial.

Then at p 32 of the grounds of judgment, the learned judge said (at p 601C–E):

H > The allegations against the two senior deputy public prosecutors interfere with the due administration of justice as they are of such a nature as to affect the dignity and authority of the court's proceedings (see *R v Collins* [1954] VLR 46). This becomes particularly significant in this case in the light of the immense public interest that it has generated. An allegation that the involvement of the two senior deputy public prosecutors in this case has raised
I grave doubts as to the integrity of the evidence adduced will seriously affect public confidence in this trial. The motion interferes with the course of justice or has a tendency to do so. I was therefore of the view that the filing of the motion by ZZ was scandalous, frivolous, vexatious and an abuse of the process

> of the court with the objective of undermining the integrity of this trial. It had the tendency to deflect the court from a strict and unhesitating application of the letter of the law and from determining the issues exclusively by reference to the evidence.

With these findings made by the learned judge, it is difficult for us to say that he had, as said by the Supreme Court in *Cheah Cheng Hoc*'s case, 'misused' the power of the summary procedure. As such we cannot interfere with the learned judge's exercise of such power.

For the reasons stated above, we dismiss the appeal against conviction.

As to sentence, we find that the learned judge has not taken into consideration any irrelevant matters. Before citing the appellant for contempt, the learned judge, in fact, offered him the opportunity to apologize. But the appellant refused to apologize. Again, after finding the appellant guilty of contempt and before proceeding to convict him of the offence, the learned judge offered him another opportunity to apologize. Again the appellant refused to apologize. An apology might have even changed the nature of the punishment (*MY Shareef & Anor v Hon'ble Judges of the Nagpur High Court*).

We note that the learned judge had referred to the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor and another application* [1990] 1 MLJ 273. In that case, the first and second respondents were advocates and solicitors. And that was a 1990 case. Now the circumstances have changed. We observe that lately there has been an increase in contempt offences being committed by advocates and solicitors. As such we feel that the time is now ripe for imposition of custodial sentence in contempt offences.

The learned judge had also considered the case of *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240. In that case a journalist committed the contempt. He was convicted and sentenced to three months' imprisonment. He appealed to this court against the conviction and sentence. This court allowed his appeal in sentence and Denis Ong JCA (see [1999] 4 MLJ 321 at p 360), said:

> The other factor relevant to sentencing is the matter of apology. I accept that there was an expression of regret by the appellant given early in his affidavit and that was not discourteous or unbefitting having regard to the circumstances which were unclear to him at that point in time. I accept also that there was an offer to apologize by the appellant if he was told where in the said article he had offended. But there was no response to his offer. To my mind, this is not a case where the offender was unwilling to apologize.

In the appeal now before us, no such circumstances exist. The appellant in fact adamantly and arrogantly refused to apologize. We, therefore, respectfully feel that the three months' imprisonment is not excessive. We accordingly dismiss the appeal against sentence.

Appeal against conviction and sentence dismissed.

Reported by Andrew Christopher Simon